No. 14,350

United States Court of Appeals

For the Ninth Circuit

DORIS BERNICE SHACKELFORD, ALLAN RAY SHACKELFORD and LARRY WILLIAM SHACKELFORD, Minors, by Doris Bernice Shackelford, Their Guardian ad Litem,

Appellants,

vs.

MISSION TAXICAB COMPANY, INC., a Corporation; ROBERT GOODRICK and BUFORD H. SHIPMAN,

Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANTS.

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BASES OF JURISDICTIONS.

1. The United States District Court for the Northern District of California, Southern Division, had jurisdiction in this case under the provisions of 28 U.S.C., Section 1332(a)(1) whereby jurisdiction is conferred in civil actions where the matter in

controversy exceeds the sum of $3000.00 and is between citizens of different states. The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment in question under the provisions of 28 U.S.C., Section 1291.

2. Diversity of citizenship of plaintiffs from all defendants together with the fact that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00, is pleaded in paragraph VII of the complaint (R. pp. 5-6).

3. Defendants' admission of the facts pleaded in paragraph VII of the complaint is contained in paragraph I of the answer (R. p. 11).

PRELIMINARY ABSTRACT OF THE CASE.

Appellants brought this action in the District Court for damages for wrongful death. The action arose out of a collision involving a taxicab and a private automobile which occurred on July 30, 1950 in Santa Clara County, California. The collision occurred at 2:30 A.M., on a bright, moonlight night when the defendant taxicab driver while proceeding northerly in the most easterly lane of a straight, level, four-lane highway first observed a Studebaker automobile facing southerly in the most easterly lane of the highway (head-on to the taxicab) only 85 to 100 feet away. William T. Shackelford, deceased, was a passenger for hire in the taxicab. He died as a result of the injuries sustained in the collision. Appellants, Doris

Shackleford, for herself and as guardian *ad litem* of her two children, are the heirs of William T. Shackelford, deceased. Appellees, Mission Taxicab Company, Inc. and Robert D. Goodrick were the owner and driver respectively of the taxicab. The action was tried by the Court without a jury after which the Court, per Chief District Court Judge Michael J. Roche, found that appellees were not reckless, careless or negligent in the operation of the taxicab. The Court then entered its judgment in favor of appellees and against appellants. This appeal has been taken from that judgment on the grounds that (1) the evidence does not support the findings of fact and conclusions of law, and (2) the findings do not support the judgment.

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in making its findings XI, XII, and XIII (R. p. 34) to the effect that appellees did not negligently, carelessly or recklessly operate the taxicab.

2. The District Court erred in making its finding XIV (R. p. 35) that appellees operated the taxicab "with all due care and caution".

3. The District Court erred in making its finding XIV (R. p. 35) "that said Studebaker sedan automobile so operated by said Dallas Cutler entered said easterly portion of said U.S. High 101 within such close proximity to the approaching taxicab operated

by said defendant Robert Goodrick that said defendant Robert Goodrick was unable to avoid colliding with said Studebaker".

4. The District Court erred in making its finding XIV (R. p. 35) that "the injuries sustained by said William Thomas Shackelford, deceased, and the damages sustained by plaintiffs were wholly and solely, directly and proximately caused by the recklessness, carelessness and negligence of said Dallas Cutler".

5. The District Court erred in rendering judgment for the appellees and not for the appellants (R. pp. 37-38).

STATEMENT OF FACTS TO BE DISCUSSED.

On July 30, 1950 William Thomas Shackelford, deceased, was an aviation radioman 1st class, attached to the United States Naval Air Station, Moffet Field, in Santa Clara County, California (R. pp. 14-15). At about 2:15 A.M. on that date appellee, Robert Goodrick, driving one of appellee Mission Taxicab Company Inc.'s taxicabs picked up the deceased, William T. Shackelford, and Earl Brantley, another Naval enlisted man, in San Jose, California and commenced transporting them for hire toward U.S. N.A.S., Moffet Field by way of U. S. Highway 101 (also known as the "Bayshore" Highway) (R. pp. 56-57). At about 2:30 A.M. on said date the taxicab driven by appellee Goodrick on U. S. Highway 101 was involved in a collision with a Studebaker sedan

automobile (R. p. 43 and p. 48). In this accident deceased Shackelford sustained fatal injuries (R. p. 76).

At the point where the accident occurred, the highway is straight and level and runs generally north and south (R. p. 44). It is a four lane highway with eleven foot lanes and the two northbound lanes are separated from the two southbound lanes by a double line (R. p. 44). The shoulders on each side of the highway are twenty feet wide (R. p. 44).

At the time of the accident the road was dry (R. p. 59), the night was clear (R. p. 58) and the moon was bright (R. p. 62), it being within four minutes of midway between moonrise and moonset on the night following the full moon (R. p. 76).

Immediately prior to the accident the taxicab was being driven north in the outside (or most easterly) northbound lane (R. p. 58). It had been in this lane for "quite a while" (R. p. 65). Then at a distance of 85 to 100 feet directly in front of him in the outside (most easterly) northbound lane the taxicab driver, appellee Goodrick, first saw the two headlights of a Studebaker automobile (R. pp. 60, 63-64 and p. 70). The taxicab driver, appellee Goodrick, could not tell whether the Studebaker was stopped or moving (R. p. 60). The taxicab driver, appellee Goodrick, swerved to his left and the two vehicles collided at a point midway between the outside and inside northbound lanes (defendant's exhibits B and C) (R. pp. 45 and 55). There were no skid marks made by

either car prior to the point of collision (R. p. 47). After the collision the Studebaker was resting on its side at the point of impact (R. p. 55) and the taxicab came to rest across the highway on the westerly shoulder 160 feet northerly of the point of impact (R. pp. 46-47).

The lights of the taxicab were in good condition and their beam was that of the standard car (R. p. 63). At the time of the accident the lights of the taxicab were on low beam (R. p. 63) and the nearest southbound car observed by the taxicab driver (other than the Studebaker) was more than 500 feet away (R. p. 68).

There is no evidence as to (1) from whence came the Studebaker; (2) how long it had been in the northbound lane prior to the time it was seen by the cab driver, and (3) the speed of the Studebaker.

ARGUMENT.

Appellants do not seek on this appeal to have the evidence re-weighed. Appellants recognize and agree that for the purposes of this appeal all the evidence favorable to appellees must be considered to be true and further that every favorable intendment must be given such evidence. Conceding this, appellants contention which will be argued below is as follows: As a matter of law the findings that appellees were not negligent in the operation of the taxicab are not supported by the evidence. This follows from the

facts (1) that appellants were at all stages of this case entitled to the benefits of the doctrine of *res ipsa loquitur* and (2) that appellees failed as a matter of law to offset or balance the inference of negligence thus raised. Appellants further contend that as a matter of law the evidence produced by appellees affirmatively proves appellees to have been negligent.

I. THE FINDINGS THAT APPELLEES WERE NOT NEGLIGENT IN THE OPERATION OF THE TAXICAB ARE NOT SUPPORTED BY THE EVIDENCE AS A MATTER OF LAW.

Appllants submit that the evidence introduced in this case fails as a matter of law to support the findings that appellees were not negligent and that they operated the taxicab with all due care and caution.

A. RES IPSA LOQUITUR COMPELS THE FINDING THAT APPELLEES WERE NEGLIGENT.

1. Res Ipsa Loquitur imposes upon appellees the burden of explaining that the accident could not have been caused by appellees' negligence.

The sifinificance, scope and effect of the doctrine of *res ipsa loquitur* has heretofore been the matter of great confusion in the California Courts. See Prosser, *Res Ipsa Loquitur in California* (1949), 37 Cal. L. Rev. 183. Very recently however, the California Supreme Court undertook a complete review of the problem and in two carefully considered opinions re-

solved all prior confusion and restated clearly and definitely the California Law of *res ipsa loquitur*. *Hardin v. San Jose City Lines, Inc.* (August 1953), 41 C. (2d) 432, 260 P. (2d) 63. *Burr v. Sherwin-Williams Co.* (April 1954), 42 A.C. 699, 268 P. (2d) 1041.

In California the doctrine of *res ispa loquitur* is applicable in favor of a passenger in a common carrier as against such carrier where the passenger is injured as a result of a collision between the carrier's vehicle and a vehicle operated by a third party. *St. Clair v. McAlister* (1932), 216 Cal. 95, 13 P. (2d) 924; *Dieterle v. Yellow Cab Co.* (1939), 34 C.A. (2d) 97, 93 P. (2d) 17; *Stark v. Yellow Cab Co.* (1949), 90 C.A. (2d) 217, 202 P. (2d) 802. And this is so even though specific proof is produced to show the collision was due to the negligence of the other vehicle—the doctrine still being applicable in favor of the passenger and against the carrier to the effect that the carrier was *also* at fault. *St. Clair v. McAlister* (1932), 216 Cal. 95, 13 P. (2d) 924; *Sloan v. Original Stage Line* (1932), 124 C.A. 317, 12 P. (2d) 465; *Burke v. Dillingham* (1927), 84 C.A. 736, 258 P. 627.

The procedural effect of *res ispa loquitur,* whenever the doctrine applies, is to give rise to a "special kind of inference" in the nature of a rebuttable presumption which the defendant *must* rebut by evidence sufficient to meet or offset it. If the defendant fails to present such evidence sufficient to meet or offset the "special kind of inference" the plaintiff must be given judgment. *Hardin v. San Jose City Lines,*

41 Cal. (2d) 432 at 436, 260 P. (2d) 63 at 65, as further explained in *Burr v. Sherwin-Williams Co.* (1954), 42 A.C. 699 at 705, 268 P. (2d) at 1044.

Applying these rules of law to the present case it follows that the doctrine of *res ipsa loquitur* applies in favor of the appellants and against the appellees raising this "special kind of inference" (in the nature of a rebuttable presumption) that the injury sustained by appellants was caused by appellees' negligence. The burden then shifted to appellees to go forward and produce evidence *sufficient* to *offset* or *balance* this inference.

The question now presented is: "What evidence must appellees produce in order to sustain the burden thus imposed upon them?" One provision of the California Civil Code and three decisions of the California Supreme Court combine to provide a clear and definitive answer to this question.

Section 2100 of the Civil Code of California provides:

> "A carrier of persons for reward must use the *utmost* care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill".[1]

In the *Hardin* case, supra, where the plaintiff was a passenger on a bus the Supreme Court stated that if

[1]All emphasis within quotations supplied by appellants unless otherwise indicated.

the passenger was injured as the result of the operation of the bus:

> "* * * an inference arose that her injury was caused by defendants negligence and that *it was incumbent upon defendant to rebut the inference by showing that it exercised the utmost care and diligence.*." (*citing Calif. C. C. 2100) (41 C. (2d) 432 at 437, 260 P (2d) 63 at 65).

What constitutes a showing by a common carrier of the exercise of the utmost care and diligence was more explicitly set forth by the California Supreme Court in the case of *Bourguignon v. Peninsular Ry. Co.* (1919), 40 C.A. 689 at 694, 181 P. 669 at 671. In that case a passenger in a railroad car was injured when the car was derailed. Judgment for the plaintiff was affirmed on appeal. In denying a petition for a hearing by the Supreme Court, that Court first commented upon an instruction concerning the defendant's burden of proof in rebutting the inference of negligence and then said:

> "* * * The true rule is that where the accident is of such a character that it speaks for itself as it did in this case, and raises a presumption of negligence, the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but

must have been due to some unpreventable cause, although the exact cause is unknown.

In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers *all* causes which due care on the part of the defendant might have prevented. In the case of an accident to a passenger in the course of transportation by a railway company, *the explanation or care shown,* as the case may be, *must be most satisfactory in the sense that the carrier is held to a very high degree of care.*

But the proof which is required of such explanation or care is a different matter from the explanation or care itself. The explanation or the care shown, if true, may be perfectly satisfactory. The proof of its truth may or may not be satisfactory. On this point the rule is the same as in the case of any other presumption which a defendant must meet, that is, he is not obliged to overcome the presumption by a preponderance of evidence, but it is sufficient for him to give such proof of the truth of his explanation or of his contention that he exercised due care in all particulars as to offset the presumption in the minds of the jury and produce a balance in their minds on the question of its truth. Throughout the plaintiff must prove his case by a preponderance of evidence".

The law enunciated in the *Bourguignon* case is as sound today as it was on the day the case was decided. The requirements as to the nature of defendants showing were quoted with approval and followed by the

California Supreme Court in *Dierman v. Providence Hospital* (1947), 31 Cal. (2d) 290 at 295, 188 P. (2d) 12 at 14, and by the District Court of Appeal in *James v. American Buslines* (1952), 111 C.A. (2d) 273 at 276, 244 P. (2d) 503 at 504.

It thus appears that to satisfy their burden appellees must produce evidence showing either:

1. A definite cause for the accident in which there exists no element of negligence on the part of appellees; or

2. Such care in all possible respects as necessarily to lead to the conclusion that the accident could not have been caused by want of care on the part of appellees.

Applying this test to the evidence in this case will demonstrate that appellees have failed to sustain their burden.

2. No definite cause for the accident has been shown in which there exists no element of negligence on the part of appellees.

The evidence shows that the collision was caused in part by the fact that the Studebaker was on the wrong side of the highway. From its location it may certainly be inferred that its operator was negligent. But, both by logic and by the established California law it is clear that proof of the probable negligence or even of the indisputable negligence of the operator of the Studebaker can have no probative effect to show that the taxicab driver was free from negligence. *St. Clair v. McAlister* (1932), 216 Cal. 95, 13 P. (2d)

924; *Sloan v. Original Stage Line* (1932), 124 C. A. 317, 12 P. (2d) 465.

(The trial court found that the Studebaker entered the northbound lane within such close proximity to the taxicab that it could not have been avoided. If there were evidence to support this finding appellants would concede the case, but as pointed out hereinafter (at page 18) there is not an iota of evidence on which to support this finding.)

3. The evidence fails to show the exercise of such care in all possible respects by appellees as necessarily leads to the conclusion that the accident could not have been caused by want of care on their part.

In at least two vital aspects the evidence *fails to show* the exercise by appellees of the utmost care and diligence required of them.

(a) The unexplained failure of the taxicab driver to see the Studebaker prior to the time it was only 85 to 100 feet away renders impossible the conclusion that the accident could not have been caused by want of care on the part of appellees.

It is the indisputable evidence that appellee, Goodrick, the driver of the taxicab, failed to see the Studebaker until the two vehicles were only 85 to 100 feet apart (R. p. 60). No explanation of this failure is to be found in the evidence. The evidence shows that the Studebaker was on the wrong side of the highway in the northbound lanes in a visible position prior to the time it was seen by Goodrick.

The Studebaker was in the northbound lanes prior to the time it was seen. This is proved by the testi-

mony that when first seen the Studebaker was *completely* in the outside northbound lane facing "head-on" to the northbound taxicab (R. p. 70). Goodrick's testimony that he did not know whether the Studebaker was stopped or moving is also significant (R. pp. 60 and 65). At the time first seen by the taxicab driver the Studebaker was not moving *laterally* across the northbound lanes. To get where it was when first seen it had to move laterally across one or more of the northbound lanes (depending upon whether it came across the double line or across the twenty foot easterly shoulder). This lateral movement on the northbound lanes occurred prior to the time the Studebaker was seen. It, therefore, follows that the Studebaker must have been on the northbound lanes prior to the time it was seen by Goodrick.

The only evidence in this case bearing upon the question of speed of the Studebaker indicates that the Studebaker was either stopped or going very slowly. This evidence consists of Goodrick's testimony (referred to above) that he couldn't tell whether or not the Studebaker was stopped, together with the evidence of Officer DeVries and the photographs (Defendant's exhibits C and D) showing that after the sideswipe collision the Studebaker was resting on its side *at the point* of impact. When the location of the taxicab in the outside northbound lane is considered in the light of the evidence that it was either stopped or proceeding slowly it follows that the Studebaker was on the northbound lane a relatively long period of time.

The Studebaker was visible to the taxicab driver prior to the time it was seen by him. There was nothing obstructing the taxicab driver's vision of the highway before him. The highway at this location is straight and flat (R. p. 44). The illumination was sufficient to disclose an automobile at a distance greater than 85 to 100 feet. From appellee Goodrick's testimony an inference might be drawn that prior to the moment seen the Studebaker did not have its lights on. But lack of lights on the Studebaker can not explain appellees' failure to see it until only 85 to 100 feet away. It is significant that with the burden of explanation upon him the taxicab driver never testified that lack of lights on the Studebaker prevented his seeing it sooner. Of course, the other testimony in the case shows such an explanation could not be made because even with its lights off the Studebaker was visible at a greater distance than 100 feet. The night of the collision was a clear, bright, moonlight night (R. pp. 58-59 and 76). It was virtually midway between moonrise and moonset on the night following the full moon. Goodrick himself testified that the moon was so bright that not only could he see silhouettes "plainly" (R. p. 62), but that he used only the moonlight to enable him to *read the instruments on the dashboard of his taxicab* (R. pp. 59, 62 and 68). In this connection the further testimony of Goodrick is most significant: He testified he first saw the Studebaker when only 85 to 100 feet away (R. p. 64). He testified he could not see an unlighted automobile in the moonlight 500 feet away, (R. p. 66), but he

testified *he didn't know* whether or not he could see an unlighted automobile in the moonlight 300 feet away (R. p. 66). Therefore, it must follow that he *knew* he could see an unlighted automobile at a distance greater than 100 feet.

The record thus discloses this fatal hiatus in appellees' attempt to show the exercise of such care as in all respects must necessarily lead to the conclusion that the accident could not have been caused by want of their care. This failure entitled appellants to judgment under the rules of law set forth above.

(b) It was negligence per se for appellees to drive the taxicab 55 miles per hour with its lights adjusted to low-beam when the nearest southbound car was more than 500 feet away.

Appellee Goodrick testified that he was driving 55 miles per hour—the maximum permitted on the highway at the location of the accident. He further testified that at the time he first saw the Studebaker the *nearest* southbound automobile was *more* than 500 feet away and was perhaps as much as 1000 feet away.

The California laws requires that a vehicle on the highway at night be equipped with lights (California Vehicle Code Section 618). The law further provides that the lights required shall be so arranged that the driver can select at will between different distributions of light and requires that the upper beam shall be such as to reveal persons and vehicles at a distance of at least 350 feet ahead while the lower beams shall be sufficient to reveal a person or vehicle at a distance of at least 100 feet ahead (California

Vehicle Code Section 648). Section 649 of the California Vehicle Code then provides:

> "(a) Whenever a motor vehicle is being operated on a roadway * * * [at night] * * * the driver shall use a distribution of light, or composite beam directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle, subject to the following requirements and limitations. (b) Whenever the driver of a vehicle approaches an oncoming vehicle within 500 feet such driver shall use * * * [the low beam] * * *".

Appellee Goodrick's failure to have his lights adjusted to the high beam was a violation of Section 649 of the California Vehicle Code and therefore constituted negligence *per se*. In the case of *Caperton v. Mast* (1948) 85 C.A. (2d) 157, 192 P. (2d) 467, where no approaching car required the dimming of his lights, a truck driving on the low beam was held negligent, the Court holding that

> "* * * reasonable care required him to drive with his lights on high beam, so adjusted as to comply with Section 648 of the Vehicle Code requiring an adjustment which would have revealed persons and vehicles at least 350 feet ahead". 85 C.A. (2d) 157 at 159, 192 P. (2d) 467 at 470.

Surely conduct which is thus held to be a violation of simply "reasonable" or ordinary care (the standard applicable in the *Caperton* case, supra) must in this case be recognized as constituting a most gross and flagrant violation of the *utmost* care.

Obviously where appellees failed to see the Studebaker until only 85 to 100 feet away the explantion which shows a failure to have the taxicab's headlights on high beam utterly fails to show the exercise of such utmost care as to compel the conclusion that the accident could not have been caused by appellees' want of care.

II. THE FINDING THAT THE STUDEBAKER ENTERED THE EASTERLY PORTION OF THE HIGHWAY WITHIN SUCH CLOSE PROXIMITY TO THE APPROACHING TAXICAB THAT APPELLEE GOODRICK WAS UNABLE TO AVOID THE COLLISION IS NOT SUPPORTED BY THE EVIDENCE AS A MATTER OF LAW.

The record in this case contains no evidence to support the finding that the Studebaker entered the easterly portion of the road within such close proximity to the northbound taxicab that the taxicab was unable to avoid the collision.

There is no scintilla of evidence in this case to indicate *when* or *from where* came the Studebaker on the northbound lanes. The only thing known about the Studebaker prior to the collision was that when first seen by the taxicab driver it was completely in the most easterly northbound lane and distant 85 to 100 feet.

The mere fact of the location of the Studebaker on the northbound lanes has no relevancy in indicating either where it came from or how long it had been there when first observed. No doubt the reader of this brief is sitting in a chair. From the fact

alone that the chair is now located in its present position it is impossible to say how long it has been in that position or from what direction it was last moved.

The fact of the collision itself can raise no inference that it was unavoidable. To permit such an inference would require the overruling of the California law of *res ipsa loquitur*. Where the accident itself raises the inference of negligence requiring of the appellee a showing to rebut such inference, the accident itself cannot provide the second inference which rebuts the first. Such a result simply means that no inference of negligence arises in the first place.

Appellants submit that the only evidence in this case pertinent to this question shows that the Studebaker must have been on the northbound lanes not less than a relatively long period of time. This is the only inference that can be drawn from the evidence as to the location of the Studebaker when first seen coupled with the evidence that the Studebaker was either stopped or proceeding slowly.

III. THE EVIDENCE PRODUCED BY APPELLEES AFFIRMATIVELY SHOWS THAT APPELLEES WERE NEGLIGENT.

To this point the argument of appellants has shown that the findings of no negligence on the part of appellees are not supported because the appellees failed to explain away the inference of negligence raised by *res ipsa loquitur*.

In addition, appellants submit that the evidence produced by appellees provides *affirmative proof* that appellees failed to exercise the utmost care and diligence which was their obligation and are thereby proved to be negligent.

The admission by appellee Goodrick, the driver of the taxicab, that while driving 55 miles per hour on a straight, flat, wide, four lane highway on a bright moonlight night he failed to see a car facing him head-on in his most right hand lane until only 85 to 100 feet away is very strong evidence of negligence on his part. Such a failure would constitute a failure to exercise "ordinary", "reasonable" or "due" care expected of drivers of private vehicles. Appellants submit this constitutes an extreme violation of the very high standard of care imposed upon carriers for hire—the standard of *utmost* care.

The further admission by Goodrick that the headlights of his taxicab were on low-beam under such circumstances of speed and approaching traffic as requires, under Section 649 of the California Vehicle Code, the use of the high-beam is, as pointed out above, negligence *per se*. This also is affirmative proof of negligence on the part of appellees. Here is positive proof of conduct by appellees which has been held in the *Caperton* case, supra, to be a violation of the "reasonable" or "ordinary" standard of care imposed on drivers of private vehicles. Surely this is a most gross violation of that *utmost* care to which appellees as carriers for hire must be held.

For the foregoing reasons appellants pray that the judgment heretofore rendered for appellees be reversed and that the case be remanded to the District Court with instructions that judgment be entered for appellants in such amount as said District Court shall find appellants to have been damaged.

Dated, San Rafael, California,
August 11, 1954.

Respectfully submitted,
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